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No. 03-552

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IN THE

Supreme Court of the United States

DON APPLEGATE, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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Respondent does not dispute Petitioners' reading of the law. Respondent admits that the Court of Federal Claims ("CFC") could not interpret the parties' settlement agreement as if fee-shifting cases were binding precedent. Further, nowhere does Respondent disagree that the requirement that an attorney achieve more than was owed in order to qualify for fee enhancement is both impossible and legally erroneous. Instead, the Respondent relies upon mischaracterizations of the CFC's opinion and the facts in an attempt to gloss over these legal errors. If allowed to stand, this decision—rendered by a court with national jurisdiction—will (1) confuse the currently clear standard for interpretation of

* Petitioners' Rule 29.6 Statement appears at Pet. ii.

settlement agreements, and (2) effectively nullify this Court's express authorization of enhancement in exceptional cases.

1. Respondent goes to tortuous lengths to avoid the CFC's holding "that this Court's fee shifting cases are binding upon parties to a settlement agreement that incorporates no fee shifting statute." *See* Brief in Opposition ("Opp.") 4-5. But the CFC's opinion could not be clearer on this point. The CFC viewed the situation in black and white terms: either common fund or fee-shifting cases would bind its decision. Pet. App. 18a-23a. The court found the fee-shifting cases more analogous, and unequivocally concluded that "the principles applicable in fee shifting cases * * * *shall be applied* by this court." *Id.* 22a-23a (emphasis added). The court thereafter treated fee-shifting cases as if they were binding precedent rather than guidelines outlining the relevant policy considerations. This squarely conflicts with the analyses of the *Wing* and *Dutchak* courts, which concluded that in the context of a settlement agreement contract principles alone apply. *See Wing* v. *Asarco*, 114 F.3d 986, 989 (9th Cir. 1997); *Dutchak* v. *Central States, Southeast & Southwest Areas Pension Fund*, 932 F.2d 591, 594 (7th Cir. 1991).

Because the court explicitly found that the parties did not incorporate the URA into their settlement agreement, it was error to interpret the contract as if fee-shifting principles were binding. In doing so, the CFC engrafted Congressional intent and the severe limitations of fee-shifting statutes upon the settlement agreement, despite separately concluding that the parties had unquestionably not intended those restrictions to apply.[1]

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[1] Remarkably, Respondent asserts without citation that the URA "formed the backdrop for the negotiation of the settlement agreement." Opp. 5. In fact, the CFC found that "there is not a shred of evidence either that the parties intended that the determination of a 'reasonable' attorneys fee would be controlled by the

2. Respondent includes an entire footnote justifying the CFC's use of the lodestar approach—despite the fact that the initial petition for certiorari did not contest the propriety of such an approach. Opp. 5 n.3; Pet. 13-16. Respondent has missed the point entirely. The error of the CFC was not in engaging in a lodestar calculation, but in believing itself foreclosed from all further inquiry (save exceptionality) by "severely restricting" fee-shifting principles. Pet. App. 19a.[2]

Rather than utilizing principles of contract interpretation to review factors traditionally bearing upon a reasonable fee, such as risk, delay, counsel's continuing obligations, and the fees incurred under Petitioners' admittedly reasonable contingent fee agreements,[3] the CFC applied the restrictions

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URA or even that defendant somehow unilaterally expressed or reserved the point." Pet. App. 11a.

[2] *Gisbrecht* v. *Commissioner of Social Security*, 535 U.S. 789, 807-809 (2002), illustrates two relevant points: (1) that fee-shifting case law is binding only when the court is awarding fees under a fee-shifting statute, and (2) the existence of a reasonable contingent fee agreement is a relevant factor when no fee-shifting statute applies. This Court and others have readily recognized that, *absent statutory restrictions*, a reasonable fee for a lawyer who is paid promptly as litigation progresses is not a reasonable fee for a lawyer who bears the risk of non-payment if unsuccessful, as well as the delays and costs attendant thereto. Pet. 14 n.12.

[3] Undisputed testimony and Respondent's admissions established that Petitioners' contingent fee agreements were reasonable and that the fees thereunder were actually incurred. Appellants' Fed. Cir. Br. 61 (citing Respondent's admissions during argument at A1911, A1913); Fed. Cir. Reply Br. 28 (citing testimony of Respondent's and Petitioners' expert witnesses and Respondent's admissions during argument at A1474, A1790, A1913, and A1954). The CFC clearly thought itself bound to ignore this uncontested evidence—highly relevant in determining a reasonable fee—because it had unilaterally declared itself to be constrained by severely restrictive fee shifting principles.

of fee-shifting jurisprudence to Petitioners' claim although acknowledging no fee-shifting statute was applicable. This error directly conflicts with this Court's jurisprudence and the Seventh and Ninth Circuits' decisions in *Wing* and *Dutchak.*

3. Respondent next attempts to salvage the CFC's decision by asserting that there is no conflict with *Wing* and *Dutchak* because those courts also "looked to fee-shifting cases for guidance," Opp. 8, and that the awards of enhancements in those cases were "based on provisions of the particular settlement agreements * * * not present here." *Id.* n.5. Upon examination, neither statement supports Respondent's position.

a. It is true that the *Wing* and *Dutchak* courts "looked to fee-shifting cases for guidance," in that they cited to some fee-shifting decisions and utilized the principles of fee-shifting cases *where appropriate.* The Seventh and Ninth Circuits properly maintained the primacy of contract, however, and did not foreclose entire avenues of inquiry by forcing the settlement agreements to masquerade as either "fish" or "fowl." *See Wing*, 114 F.3d at 989 (recognizing similar circumstance as "neither fish nor fowl nor fair weather game; i.e., neither *Dague*[4] (in that the fee-shifting is voluntary and contractual rather than statutorily-mandated)

Respondent is wrong to suggest that the above statement and other assertions in the Petition are unsupported because the Petition cites to the appellate briefs. Opp. 4 n.2. The pages referenced in the briefs refer in turn to the record, and thus the statements are clearly not "unsupported." In analyzing whether a statement is substantiated, the Court looks to the citations within the cited source. *See Konigsberg* v. *State Bar of Cal.*, 353 U.S. 252, 256 n.7 (1957) ("The brief did refer to pages of the record where constitutional arguments were made and cases cited to support them.").

[4] *City of Burlington* v. *Dague*, 505 U.S. 557 (1992).

nor *WPPSS*[5] (in that class counsel's fee would come from the defendant directly and not out of the class recovery)"); *Dutchak*, 932 F.2d at 594-595 ("Instead of classifying the case as 'common fund' or 'fee shifting,' [the court] must plumb the language of the settlement to determine its meaning and, if ambiguous, to determine the parties' intent."). Unlike the CFC, the Seventh and Ninth Circuits examined all the relevant information in determining the proper fee.

b. Respondent suggests that the *Wing* agreement "expressly contemplated a fee award of more than twice the amount of the agreed-upon lodestar figure," Opp. 8 n.5, seeming to imply that the agreement provided for fees consisting of a multiple of the lodestar. This is simply untrue. In fact, the parties agreed on the lodestar, but disagreed as to whether a multiplier was appropriate. The sole reference to a large fee award was a contingency plan for installment payments.[6]

As Respondent notes, the settlement agreement in *Dutchak* did specifically refer to four decisions that approved contingency multipliers, but also "other relevant federal court decisions based thereon." 932 F.2d at 593. Rather than classifying itself as bound by fee-shifting principles, the court examined the parties' intent behind the choice of law provi-

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[5] *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291 (9th Cir. 1994).

[6] The Settlement Agreement permitted Asarco to take up to two years to pay the attorneys' fee award if it exceeded $10 million. A few days later, the parties reached a supplemental agreement regarding attorneys' fees. The parties agreed that class counsel's lodestar was equal to or less than $4 million, with expenses in excess of $1.5 million, and that Asarco would not litigate this amount. The parties further stipulated that "[w]ith regard to any multiplier on the lodestar, either side may argue its position to Judge Dwyer" and either party could appeal the amount of any multiplier awarded. *Wing*, 114 F.3d at 988.

sion and determined that later, more restrictive fee-shifting jurisprudence did not apply. Thus, the Seventh Circuit also properly treated settlement agreements and fee-shifting statutes as two different animals and, accordingly, found the parties' intent dispositive. The CFC did not maintain this distinction, and that was its error.

4. Respondent does not dispute that requiring an attorney to recover more than what was owed in order to qualify for an "extraordinary results" fee enhancement is impossible and would require violation of the Federal Rules of Civil Procedure. *See* Pet. 23-24. Instead, Respondent attempts both to minimize Petitioners' achievement and to incorrectly assert that the court did not treat this erroneous standard as dispositive.[7]

a. The CFC unquestionably treated the failure to achieve more than was owed as dispositive on the issue of extraordinary results:

> The results so depicted, while remarkable, are, nonetheless, precisely what plaintiffs set out to accomplish in filing this suit. *Accordingly, measured by plaintiffs' own expectations at the outset of the case, the results obtained were not exceptional, but rather reflect what was owed.* Pet. App. 46a (emphasis added).

The CFC clearly applied this exceptional results standard as a conclusive *threshold* determination. Only results in excess of what was owed could be deemed exceptional, rendering an afterthought any further considerations of

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[7] Respondent is wrong to suggest that the CFC's adoption of an impossible standard for exceptionality is in accordance with *Blum* v. *Stenson*, 465 U.S. 886 (1984). Opp. 9. Nowhere in *Blum* did this Court require litigants to recover more than they were owed in order to prove an exceptional result.

exceptionality.[8] Pet. App. 44a–49a. Nothing in this Court's jurisprudence has suggested that a determination of exceptionality should be based upon such a threshold factor, especially one that is impossible and requires a procedural rules violation.

b. Furthermore, Respondent's attempt to downplay the results achieved in this case[9] is disingenuous, given Respondent's inside knowledge of the exceptional nature of the relief achieved by Petitioners. In its petition for certiorari in *Banks* v. *United States*, the Department of Justice admitted

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[8] As to the other factors the Respondent maintains were a sufficient basis for the refusal of the multiplier, undisputed record evidence established that: (1) the relief obtained did indeed change longstanding Corps policy against the Brevard County Shore Protection Project; (2) the appropriation that resulted from Petitioners' significant efforts in Congress was itself a highly risky and exceptional settlement condition; (3) Petitioners' contingent fee agreements undisputedly entitled Petitioners to a fee in excess of hourly rates; and (4) the CFC's speculation as to the attractiveness of the case was not only unsupported by any evidence, it was in error. Appellants' Fed. Cir. Br. 30-40, Fed. Cir. Reply Br. 11-12. Moreover, the fourth factor above was not set forth by Petitioners to show the result to be exceptional, but was argued to be an independent basis for enhancing the lodestar. Thus, unattractiveness was not at issue on appeal. Likewise, the third factor above was simply a consideration the CFC noted that "several courts" had considered. Pet. App. 45a.

[9] Respondent's suggestion that this case provided limited relief is simply wrong. After seven years of litigation and three years to obtain Congressional appropriations, Petitioners achieved a result that paid $5 million in damages plus interest to over 300 beachfront property owners and cities, plus a massive $42 million beach re-nourishment project that even the CFC recognized benefited "not only [Petitioners] and adjoining landowners, but the general public, as well." Pet. 8 n.3; Pet. App. 21a. The benefit to beachfront property values as a direct result of the project totaled $220 million. Pet. 8 n.3.

that it has defended "more than 100 cases involving an alleged taking by erosion (or, in a few instances, accretion). As in this case, such suits commonly are multi-party actions with tens or hundreds of plaintiffs whose ownership interests collectively span miles of ground." Petition for a Writ of Certiorari at 18, *Banks* v. *United States* (No. 03-402), *cert. denied*, 124 S. Ct. 486 (2003). Of these over one hundred erosion-based takings cases filed against the United States, it is only Petitioners who achieved both the payment of millions of dollars in damages and construction of a massive beach re-nourishment project. Pet. 8. Thus, the outcome of this litigation is truly extraordinary.

c. Respondent's focus upon the nature of relief granted in *Hyatt* v. *Apfel,* 195 F.3d 188 (4th Cir. 1999), is misplaced. Respondent suggests that *Hyatt* requires attorneys to change policy nationwide and impact beyond the confines of the litigation before the result can be considered exceptional. Opp. 10. Yet nothing in either this Court's jurisprudence or the *Hyatt* opinion suggests such an arbitrary standard.[10] Indeed, one can easily imagine an exceptional case that does not have such a component. *See, e.g.*, *Wing*, 114 F.3d at 988-989 (awarding exceptional results enhancement for monetary result achieved in localized case not involving policy change or impact beyond the confines of the litigation).

Furthermore, even if such a standard did exist, the result in this case actually satisfies it. Petitioners not only achieved appropriation and funding of the Brevard County Shore Protection Project despite national policy against such projects, Pet. 8 n.5; Appellants' Fed. Cir. Br. 8-9, but, as the CFC found, the project benefited "not only [Petitioners] and

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[10] *Hyatt* approved a "results enhancement" although the relief ordered was no more than that sought by plaintiffs in their complaint. Pet. 6-7. By contrast, the CFC here concluded that a failure to achieve more than what was owed was fatal to a claim for exceptional results.

adjoining landowners, but the general public, as well." Pet. App. 21a.

5. Finally, Respondent presents no evidence or citation to deny that this case is one of recurring national importance. Given the national jurisdiction of the CFC and Federal Circuit, their decisions have far-reaching impact upon federal contract law.

Three circuits have already addressed the interpretation of settlement agreements in this exact context, and the question will undoubtedly recur. The issue of exceptionality, of course, can arise every time a case is decided under any of the more than 100 federal fee-shifting statutes.

* * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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